In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

DWIGHT D. KINNE and CHARLES H. KINNE, and LELIA M. KINNE,
Petitioners,

vs.

STARR KING SCHOOL FOR THE MINISTRY (a corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

The facts are fully stated in the petition, *ante,* and will not be reviewed in detail. The essential points are these: Petitioners were the purchasers of farm land in California under a conditional sales contract calling for installment payments, making time of the essence. Petitioners were in default at an early date, and continued so.

The most important point for consideration is that the overwhelming evidence shows that over a period of years there were efforts to adjust the contract so as to permit the farmer-purchasers to put the land on an economically sound basis. A representative of respondent seller entered into these negotiations. Dave Jones, the agent of the Farm Security Administration, entered into the negotiations. In the meanwhile, petitioners farmed and improved the property, increasing its value threefold.

A notice of intended forfeiture was given February 26, 1942, naming March 29, 1942 as the deadline for full payment of the total purchase price. Payment was not made as called for, but *nothing was done by respondent pursuant to the notice. Negotiations for compromise continued* thereafter.

The Circuit Court of Appeals concluded, *without the evidence before it* and in direct disregard of the findings of the Conciliation Commissioner and the District Court that there was no intention to continue negotiation. But these highly pertinent facts stand uncontradicted in the record. They are recited in the Commissioner's findings (R. 6 and 17.) The transcript of testimony, athough not before the Circuit Court, fully substantiates these facts:

1. Nothing was done by respondent, after its notice of Feb. 26, 1942, to carry out its threat of forfeiture. Petitioners remained in possession.

2. The Farm Security Administration continued its activity in seeking a compromise or extension for petitioners. (R. 27.)

3. As late as December 31, 1942, almost a year after the said notice, respondent's agent wrote to the Farm Security Administration apologizing for delay in answering letters, and stating his desire to visit the ranch and see petitioners personally. (Red. Tr. p. 87.)

4. Respondent served a second notice of default on petitioners on February 10, 1943, purporting to effect immediate forfeiture, thus recognizing the continuance of the contract after the first notice, and the inefficacy of the first notice to effect forfeiture. (R. 43-45.)

ERRORS TO BE URGED.

1. The Circuit Court of Appeals erred in deciding an important question of local law in a way probably in conflict with applicable local decisions.

2. The Circuit Court of Appeals erred in deciding an important question of federal law in a way which probably conflicts with decisions of this Court.

3. In deciding the case at bar the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise by this Court of its power of supervision.

ARGUMENT.

I. THE CALIFORNIA LAW IS THAT, UNDER SUCH FACTS AS WERE FOUND BY THE CONCILIATION COMMISSIONER AND CONFIRMED BY THE DISTRICT COURT, PETITIONERS' RIGHTS UNDER THE SALES CONTRACT WOULD NOT BE FORFEITED.

1. California law respecting forfeiture.

The leading California case relaxing the harsh rule of forfeiture of contracts for the sale of land is *Boone v. Templeman,* 158 Cal. 290. The principles enunciated in that case have been consistently followed, and said decision announces California law on the subject which should have been applied in the instant case. One of the most recent cases reaffirming *Boone v. Templeman* is *Industrial Land Co. v. Walker,* 61 Cal. App. (2d) 298.

The *Boone* case was a suit by a plaintiff to enforce specific performance of a contract for the sale of land, executed by Boone as purchaser and Templeman as seller. The contract was conditional, making time of the essence. Only one payment was made when due, all others being substantially overdue. July, 1906, when plaintiff was in substantial default in payment, Templeman, without any previous demand for performance, gave Boone a written statement purporting to rescind. Boone offered to pay in full, and asked for a statement. Templeman refused to accept any money, or to give a statement, but told Boone he would consider the matter and let him know. Nothing further was heard from Templeman. Boone again made an offer, in December, but he was referred to Templeman's attorneys. This suit was instituted by Boone.

Plaintiff contended that the conduct of Templeman amounted to a waiver of the condition that time should be of the essence, and of his right to declare a forfeiture for non-payment.

The principles are ably discussed by the Court, emphasis being placed on the continued possession of the premises by the purchaser, and judgment for defendant was reversed. The decision of the Court is based on the proposition that strict performance was waived by conduct, and that where the entire balance was due, *the vendor must, in order to put the buyer in default so as to declare a forfeiture, tender a deed and give the buyer a reasonable time to perform.*

Federal Farm Mortgage Co. v. Davis, 132 F. (2d) 663 *distinguished:*

The Circuit Court placed controlling reliance upon the case of *Fed. Farm Mort. Co. v. Davis,* supra. A careful reading of the opinion in that case reveals that it presented *no element whatever* of equitable relief from forfeiture; there was absolutely no element of estoppel, nor of waiver, nor of laches. It clearly was a case coming within the harsh rule of *Glock v. Howard,* 123 Cal. 1, the leading case in California establishing the harsh rule of forfeiture, cited in the *Federal Farm Mort. Co.* opinion.

It should be remembered throughout the consideration of this matter that the findings of fact were made by the Conciliation Commissioner upon voluminous evidence; these findings were approved by the District Court. *Nothing whatever* in the record be-

fore the Circuit Court contradicts or weakens the findings bringing the case within the relaxed rule of *Boone v. Templeman.*

In the *Federal Farm Mort. Co.* case the Circuit Court of Appeals for the Ninth Circuit cites in support of its strict construction the California case of *Ballard v. MacCallum*, 15 Cal. (2d) 439, 444. That case simply recognizes the rule of strict forfeiture where conditions so warrant, but it goes on to say that strict forfeiture may be avoided where equitable considerations are present. At page 444, the Court says:

> "But aside from these special situations our courts follow the accepted doctrine that equity will relieve even against an express provision for forfeiture."

And continuing in the following paragraph on page 444, the Court recognizes the abhorrence of the law for forfeitures:

> "In such a case the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that *the construction which avoids forfeiture must be made if it is at all possible.*"

The Circuit Court of Appeals for the Ninth Circuit went out of its way to work a forfeiture; it had to disregard facts found by the Conciliation Commissioner; it had to disregard facts and conclusions affirmed by the District Court, and it had to *draw its own inferences of fact* (contrary to established appellate rule) in order to declare the forfeiture in this case.

The California law of fairness and equity should be sustained. The granting of the writ herein is the only means whereby that can be accomplished.

2. **California law respecting the issues herein as being issues of fact.**

On motion to strike property from the debtors' petition, the Conciliation Commissioner determined that there was waiver or estoppel bringing the case within the California rule that no forfeiture could be effected without the seller first giving the buyer a reasonable opportunity to pay in full, coupled with a tender of a deed to be delivered upon full payment. This determination was one of fact bringing the case within the rules hereinafter discussed in this brief, to wit, that the findings of the Commissioner, confirmed by the District Court, are not to be set aside unless plainly erroneous.

> "* * * laches is always a question of fact, as is estoppel. To accurately and fairly determine the diligence of the party rescinding, every fact and circumstance illustrating his actions should be considered, and after such consideration by the trial Court, a reviewing Court is loath to disturb the holding if reasonably supported."
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> "The defense of laches bears kinship to estoppel. Both are characteristic of equity. And, speaking generally, in applying the rules to given facts a Court will consider the equities present, the wrong to be prevented and the rights to be secured."
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> *Long v. Los Altos Country Club*, 122 C. A. 116, 120-121.

"There is no hard-and-fast rule, either as to the lapse of time or the circumstances which will justify the application of the doctrine of laches. In addition to mere lapse of time, there must exist some circumstances from which the defendant may be prejudiced, or there must be such a lapse of time that it may be reasonably supposed that such prejudice will occur if the remedy is allowed. (Citation.) *Laches is a question of fact,* on the evidence, and must be determined by a *consideration of all the circumstances of each particular case.* (Kleinclaus v. Dutard, 147 Cal. 245.) It is a question *to be determined primarily and very largely by the trial Court, and an Appellate Court will not interfere with its discretion in this respect unless manifast injustice has been done, or unless its conclusion cannot reasonably be held to find support in the evidence.* (Citations.)" (Emphasis added.)

Wolpert v. Gripton, 213 Cal. 474, 483.

"The question of laches is one for the determination of the trial Court and its conclusion thereon will not be set aside by an Appellate Court if it finds reasonable support in the evidence (citations)."

Kramer v. Associated Almond Growers, 111 C. A. 595, 601.

"Whether plaintiffs acted seasonably, and whether defendants were prejudiced by such delay, were *questions of fact for the trial Court.*"

Fry v. Board of Education, 17 Cal. (2d) 753, 761.

II. CONCURRENT FINDINGS OF A MASTER OR CONCILIATION COMMISSIONER AND THE DISTRICT COURT WILL NOT BE SET ASIDE UNLESS PLAINLY ERRONEOUS.

The status of a referee, master, and conciliation commissioner are the same so far as the force and effect of their findings of fact are concerned.

Steward v. Gauey, 116 F. (2d) 1010;
In re Miller, 111 F. (2d) 28.

In a case involving the determination of a question very similar in nature to that in the case at bar is *In re Penfield Distilling Co.,* 131 F. (2d) 694. We quote from the opinion:

> "This is an appeal from an order of the District Court sustaining the disallowance by the referee of a claim in bankruptcy. A single determinative issue of fact is presented: Is appellant Lyons, as he claims, a creditor; or is he, as was found by the referee and the district judge, a stockholder of the bankrupt corporation, the Penfield Distilling Company?
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> Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on appeal, or anything less than a *demonstration of plain mistake.*

In *Brown v. Freedman,* 124 F. (2d) 151, the opinion of the First Circuit Court covers what petitioners believe to be the law in this regard. We quote from the opinion:

> "This is an appeal under Section 24, sub. a of the Bankruptcy Act, 11 USCA Sec. 47, sub.

a, from an order of the District Court affirming an order of a referee in bankruptcy sustaining a petition to reclaim and repossess certain machinery, and directing the defendant named therein, the appellant here, as trustee in bankruptcy of the International Chewing Gum Company to turn over the proceeds of the sale thereof to the appellee."

"Counsel for the appellant, both in his brief and in argument before us, evinces a misconception of the scope of judicial review in cases of this sort. In his brief he says that the District Court 'may disregard the findings of the referee even where the review shows only a difference as to the credibility of witnesses', and with reference to this Court he says, 'The view that concurrent findings of a referee and the Court shall not be reversed if not clearly erroneous is not applicable to this appeal.' We believe counsel to be in error because the scope of the review by a District Court of findings of fact made by a referee is established by Order No. 47 of the General Orders in Bankruptcy, 11 USCA following section 53, and the scope of our review of a District Court in cases like the present is established by Rule 52 (a) of the Federal Rules of Civil Procedure, 28 USCA following section 723c. Order No. 47, supra, provides that the District Court in cases like the present is established by Rule 52(a) of the Federal Rules of Civil Procedure, 28USCA following section 723c. Order No. 47, supra, provides that the District Court 'shall accept his (a referee's) findings of fact unless clearly erroneous', and Rule 52(a), supra, pro-

vides that we shall not set aside a District Court's findings of fact 'unless clearly erroneous'. The applicability of Order No. 47 of the District Court in this case is obvious. The applicability to us of Rule 52(a) is by force of Rules 1 and 81 (a) of the Federal Rules of Civil Procedure, and Orders No. 36 and 37 of the General Orders in Bankruptcy. (Citations.)

"Therefore, whatever the rule may formerly have been, *the scope of our review of findings of fact made by a referee and adopted by a District Court is now narrowly limited.* The question for us in this case is whether the District Judge committed clear error in accepting the Referee's findings of fact for the reason that he was unable to say that those findings were clearly erroneous."

A reading of the opinion of the Circuit Court of Appeals in the case at bar impels the conclusion that the decision is based entirely upon the conclusion by the Court that if it had been the trier of facts it would have determined the issue differently than was done by the Commissioner and the District Court. This is not the function of the court on appeal; and the decision thus departs from accepted procedure. The importance of this departure, as a practical matter, in the fair administration of justice has been touched upon in the petition, ante. Let it be emphasized, however, that unless litigants can rely upon the rule of appellate procedure, it will be necessary in all cases to insist upon argument of the facts in every

appeal to a Circuit Court, with resultant increase of expense to litigants, and labor for the courts.

The precise point is covered in *Bostian v. Levich,* 134 F. (2d) 284. In that case a trustee in bankruptcy sought to recover, as preferences, the amounts of certain checks issued by the bankrupt to his father-in-law. The trial judge, to whom the case was tried without a jury, found that the proceeds of the checks were not received in payment of antecedent credits or loans to the bankrupt but in contemporaneous value exchanges. There were "other circumstances and incidents in the record which are capable of varying interpretations. * * * Neither singly nor collectively would these circumstances or the evidence generally permit an absolute declaration on our part that the check exchanges were credit or loan transactions." The Court then summarized the point petitioners here assert:

> "While the trial Court might well, no doubt, have reached a different conclusion, we have no right to declare that its findings here are clearly erroneous within the intendment of Federal Rules of Civil Procedure, rule 52a, 28 USCA following section 723c, and the judgment must accordingly be affirmed."

III. WHERE THE RECORD ON APPEAL DOES NOT INCLUDE THE EVIDENCE ON WHICH FINDINGS WERE BASED, FINDINGS MUST BE ACCEPTED AS CORRECT.

In the case at bar the appellant below did not request that the transcript of testimony before the Conciliation Commissioner be incorporated in the record on appeal. (R. 12-13.) In justified reliance on the sufficiency of the findings and conclusions of the Commissioner and the District Court, under the universally accepted rules of procedure and scope of review on appeal, petitioners here did not seek to augment the record. There was no apparent need whatever to go beyond the full and careful findings of the Commissioner.

Petitioners were more than justified in this assumption, because the Ninth Circuit Court itself had declared these principles in the case of *Bernards v. Johnson*, 103 F. (2d) 567. That was a case involving the effect of foreclosure and title to property. The Court, (Denman, Mathews and Healy, Circuit Judges) speaking through Justice Mathews, said; at page 571:

> *"The orders appealed from are based on findings. The evidence on which the findings are based is not in the record. Therefore, we must and do accept the findings as correct."*

In *Irving Trust Co. v. Nelson*, 59 F. (2d) 553, 559, it is said:

> "Where the facts upon which an order is based are in dispute, this Court must assume, *in the absence of a record containing all the evidence*, that the findings upon which the order is based are justified."

CONCLUSIONS.

Your petitioners respectfully submit that the final determination by this Court of the questions involved in this case is of the utmost importance to the rights of litigants in the federal courts, particularly litigants of limited means such as petitioners in bankruptcy and under the agricultural composition and extension provisions of the bankruptcy act.

The decision of the Circuit Court of Appeals herein is contrary to the law of California on the important question of forfeitures under conditional contracts for the sale of land; it is contrary to the decisions of this Court and Rule 52a of FRPC in setting side findings and conclusions of the trier of facts without a clear showing of error; and it is contrary to the established practice and rule as to scope of review on appeal.

Unless these errors be corrected by this Court, the effect will be to create uncertainty in the law of conditional sales of land in California, and to cause confusion in the course of judicial proceedings and make it incumbent on all litigants to go to unnecessary and unusual expense to protect their interests on appeal.

Finally, the decision in the instant case opens wide the field and opportunity to circumvent the salutary provisions of the agricultural composition and extension provisions of the National Bankruptcy Act. The importance of this phase of the problem cannot be overemphasized as bearing on the sound economy of this nation.

It is respectfully submitted that the writ prayed for be granted.

Dated, San Francisco, California,
March 12, 1945.

W. N. MULLEN,
Attorney for Petitioners.

DUARD F. GEIS,
ALFRED E. FRAZIER,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of March, 1945.

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Attorneys for Respondent.